United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7456

United States Court of Appeals

FOR THE SECOND CIRCUIT

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JULIO EVANS,

Plaintiff-Appellant,

—against—

P/S

CALMAR STEAMSHIP CO.,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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Statement

The facts as set forth in Plaintiff-Appellant's brief are substantially correct, however, set forth below are additional facts developed at the trial before Judge Solomon which undoubtedly had a bearing on his decision to grant Defendant-Appellee's motion for a remittitur.

Facts

At the trial Defendant-Appellee did not deny that Plaintiff fell and struck his left knee while working aboard the SS Calmar on May 21, 1968. Defendant denied any liability to the Plaintiff for the subsequent operation in March, 1974, at which time Plaintiff's lateral meniscus was removed by surgery.

Although the Plaintiff suffered the fall on May 21, 1968, he continued to serve aboard ocean-going vessels (T-85). This fact is not denied by the Plaintiff. In order for the Plaintiff to obtain employment aboard the ocean-going vessels in the years subsequent to the fall, he had to pass annual physicals conducted by his union. Copies of these physicals were introduced into evidence at the trial. The physical conducted by the union's physician on November 12, 1968 did not contain any finding of damage to Plaintiff's knee (A-63, 64; Exhibit 21)* nor do the physicals taken on February 2, 1970 (A-61, 62), April 18, 1971 (A-59, 60), July 10, 1972 (A-57, 58), September 12, 1973 (A-55, 56) (Exhibit 21) contain any such findings. Moreover, on July 11, 1968, approximately two months after the fall, Plaintiff signed on the SS Calmar for another voyage. Plaintiff's signed-on physical is negative to any injury to his knees (A-52, 53; Exhibit 20) and contained the following statement:

> "I hereby certify that I do not now have and have never had, to my knowledge, any physical disability, sickness or accidents except as noted on this medical examination report"

On September 19, 1971 Plaintiff was examined on behalf of Defendant by Dr. Peter C. Rizzo. Dr. Rizzo did not find any injury to Plaintiff's medial or lateral meniscus. Dr. Rizzo's finding was that Plaintiff was suffering an arthritic involvement of both knees (A-65, 67; Exhibit 22). The examination by Dr. Mauer on the same date was to the effect that he had found a positive medial meniscus

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* For the purpose of this brief the letter "A" refers to the pages of the Appendix which cover exhibits, and the letter "T" is used to designate pages from the trial transcript as reproduced in the Appendix.

injury. Subsequent to both examinations, Plaintiff continued to work on ocean-going vessels (T-85) until he entered the Public Health Hospital for a prostrate condition. While in the hospital, he underwent surgery on his left knee, at which time the doctors removed his lateral meniscus. Dr. Rizzo, at the trial, was of the opinion that if Plaintiff had a lateral meniscus injury in March, 1974, it must have been the result of some intervening event between the time of examination of September 19, 1971 and the operation (T-146, 149). Dr. Rizzo testified that the MacMurray test was twofold to ascertain whether an individual was suffering from either a medial or lateral tear (T-142, 143). Dr. Mauer's finding of a medial meniscus in September, 1971 was contrary to the findings of Dr. Rizzo and all other doctors who had examined him from May, 1968 until the time of the operation. The findings of the other doctors supported and collaborated Dr. Rizzo's findings of an arthritic condition (T-167). After Judge Solomon entered his order with respect to the remittitur and new trial, Plaintiff refused to accept the remittitur and a new trial came on before Judge Cannella on April 23, 1975. On the morning of the second day of the trial, Judge Cannella advised Plaintiff's counsel that he would permit the jury to hear evidence on the issue of Plaintiff's comparative (contributory) negligence. This statement was made while the jury was secluded. During the morning of April 24, 1975, prior to Plaintiff accepting the remittitur under protest, Judge Cannella, from the bench, with the jury secluded, advised Plaintiff's attorney that he would not allow the heart attack issue to be submitted to the jury.*

* A complete transcript of the second trial was not certified to this court on the appeal by the Plaintiff, however, both counsel agreed that Judge Cannella did make a statement with respect to the heart issue. Plaintiff's attorney agrees that in words or substance the Judge made such a remark. However, Plaintiff's counsel at this time is in doubt whether such remarks were made from the bench or in the robing room.

At the second trial neither party introduced evidence on the heart attack issue prior to Judge Cannella's statement.

ARGUMENT

POINT I

A Judgment on a Remittitur Accepted Under Protest Is Not Appealable in This Court.

This court in *Reinertsen* v. *George W. Rogers Construction Corporation,* —— F.2d ——, (a copy of this court opinion appears at pages 24-34 of Plaintiff's Appellant brief), adhered to its long standing principal that a remittitur is not appealable, even if accepted under protest. In *Reinertsen,* supra, this court refused to adopt the practice of the Fifth Circuit. In this case, Plaintiff's attorney (who was also the Plaintiff's attorney in *Reinertsen*) seeks to have this Court adopt the rule of the Fifth Circuit, on the premise that this case places the issue of appealability of remittitur squarely before the Court. (*Reinertsen* opinion page 33, Appellant's brief). However, the facts do not support such a contention.

In this case Plaintiff proceeded to a second trial, and it was only after Plaintiff became disenchanted with the proceedings that he decided to accept the remittitur under protest.

For Plaintiff to fall within the Fifth Circuit Rule, he should have accepted remittitur immediately, had judgment entered thereon and immediately appealed to this court. If Plaintiff had done this, this court would have the issue squarely before it.

To permit Plaintiff to appeal the remittitur after having proceeded to a second trial would be to deny defendant the

right to a second trial. Plaintiff should have finished the second trial and appealed from that judgment. If the second trial contained error, this court could set aside the verdict and reinstated the first trial verdict. By proceeding to the second trial, Plaintiff waived any right he had to appeal the remittitur, and is now estopped from raising the issue before this court.

Plaintiff's course of action placed an undue burden of time on the Court below at the second trial and the appeal is an abuse of this Court's time. This is exactly the type of conduct, the defendant's attorney in *Reinertsen*, supra, argued would result, if this court were to adopt the Fifth Circuit Rule. It is not only the right of a plaintiff that must be protected *but also the rights of a defendant.* (Emphasis Added)

POINT II

If This Court Finds That a Remittitur Under Protest Is Appealable the Only Issue to Be Decided Is Did the Trial Judge Abuse His Discretion in Granting the Remittitur.

As indicated in Point III, infra, the ordering of a remittitur by Judge Solomon was not an abuse of discretion and the record supports his decision.

POINT III

It Was Not an Abuse of Discretion by the Trial Judge in Ordering a Remittitur, or in the Alternative a New Trial.

It is well settled law that a trial judge has the power to reduce a jury verdict if he consciously believes that the jury exceeded the bounds of propriety and the verdict compels the conclusion that it is shocking to the judicial conscience, "*Dagnello* v. *Long Island Railroad Co.*, 193 F. Supp. 552. Judge Solomon in his order giving remittitur (A-2) found that for him "to refuse to reduce this verdict would be a manifest abuse of discretion. I cannot permit such an award to stand.*

Plaintiff has failed to demonstrate to this court an abuse of discretion by Judge Solomon in ordering the remittitur. It cannot be seriously argued that a trial judge is not fully conversant with all the proceedings in ordering a remittitur without having before him the trial transcript. It must be assumed that Judge Solomon, when ordering the remittitur, reviewed his trial notes and had a clear recollection of the testimony.

POINT IV

The Rulings of Judge Cannella at the Second Trial Were Correct and Not an Abuse of Discretion.

The courts have held that one district judge can overrule or review a decision of another district judge. *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F.2d 131 (2nd Cir. 1956).

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* Line 32 on page A-2 does not appear in the appendix and was probably inadvertently cut off when the appendix was put together.

The order of one judge is not binding but rather is addressed to the good sense of his colleague. *Rogers* v. *Valentine,* 426 F.2d 1361 (2nd Cir. 1970).

As a matter of fact, at the second trial, Judge Cannella advised the attorneys for both parties that he had spoken to Judge Solomon and had Judge Solomon's full consent to do what he (J. Cannella) considered correct (A-49).

POINT V

Defendant Never Abandoned Nor Waived the Defense of Contributory Negligence.

At the first trial Plaintiff was questioned by Defendant's attorneys as to his knowledge of the danger in pulling the wire, and admitted that the chief mate had warned him that the hatch was opened. (T-123-124)

As a matter of fact, the charges to the jury at the first trial included a charge of contributory negligence.

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

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Of Counsel

UNITED STATES COURT OF APPEALS
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Appeal From The United States District Court For the Southern District of New York

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Affidavit of Service by Mail

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

LOUIS MARK, being duly sworn, deposes and says: That he is over twenty-one years of age: That on the 20th day of January 1976 he served three copies of the attached Appellee's Brief on Paul C. Matthews, Esq., Attorney for Plaintiff-Appellant, by enclosing said copies in a fully post-paid wrapper addressed as follows and depositing same in The United States Post Office maintained at No. 350 Canal Street, New York City, New York.

Paul C. Matthews, Esq.
11 Broadway
New York, N.Y. 10004

Louis Mark
Louis Mark

Sworn to before me this

20th day of January 1976

Abraham L. Meilen

ABRAHAM L. MEILEN
NOTARY PUBLIC, State of New York
No. 31-0021352
Qualified in New York County
Commission Expires March 30, 1976